

FILED

NOV 29 2011

POSTED ON WEBSITE
NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA
SACRAMENTO DIVISION

In re) Case No. 10-53637-E-13

G. WENDELL ULBERG and)
KATHLEEN M. ULBERG,)

Debtor(s).)

G. WENDELL ULBERG and)
KATHLEEN M. ULBERG,)

Adv. Pro. No. 11-2122
Docket Control No. SAC-2

Plaintiff(s),)

v.)

BANK OF AMERICA, N.A., et)
al.,)

Defendant(s).)

This memorandum decision is not approved for publication and may not be cited except when relevant under the doctrine of law of the case or the rules of claim preclusion or issue preclusion.

MEMORANDUM OPINION AND DECISION

G. Wendell Ulberg Jr. and Kathleen M. Ulberg ("Plaintiff-Debtors") commenced this Adversary Proceeding against Bank of America, N.A., Pacific Crest Partners, Inc. ("Pacific Crest"), John Mudgett ("Mudgett"), and Recontrust Company, N.A. ("Recontrust") concerning ownership of real property commonly known as 1382 Mineral Springs Trail, Alpine Meadows, California (the

1 "Property"). Though this litigation the Plaintiff-Debtors seek to
2 establish that they and their Chapter 13 bankruptcy estate are the
3 owners of the Property, having ownership interests superior to
4 those of the Defendants.

5 **OVERVIEW OF ADVERSARY PROCEEDING**

6 Movant-Defendants Pacific Crest and Mudgett move the court for
7 an order abstaining from hearing this adversary proceeding on the
8 basis of mandatory abstention, pursuant to 28 U.S.C. § 1334(c)(2),
9 because it alleges that the proceeding is based upon state law not
10 arising under Title 11, and could not have been commenced in this
11 court without the filing of the parent bankruptcy case. Because
12 the court concludes that it is appropriate for this adversary
13 proceeding to be heard, the motion for abstention is denied.

14 Plaintiff-Debtors assert that they are the owners of the
15 Property, which is a single family home. On December 27, 2010, at
16 8:00 a.m., Recontrust conducted a nonjudicial foreclosure sale on
17 behalf of Bank of America, N.A. and sold the home to Pacific Crest.
18 On December 27, 2010, at 1:30 p.m., Plaintiff-Debtors filed for
19 relief under Chapter 13 of Title 11. On January 10, 2011,
20 Plaintiff-Debtors filed a plan that proposed to pay \$2,600.00 per
21 month for 36 months, despite the fact that the house had already
22 been sold. On February 1, 2011, Plaintiff-Debtors filed a first
23 amended plan that proposed to pay \$720.00 per month for 36 months
24 to pay for a car and priority taxes.

25 On February 22, 2011, the Plaintiff-Debtors filed this
26 adversary proceeding against several defendants, including Bank of
27 America, N.A., Pacific Crest, Mudgett, and Recontrust. On
28 March 15, 2011, a First Amended Complaint was filed, which alleges

1 the following causes of action:

- 2 (1) Fraud against Bank of America, N.A.,
- 3 (2) Negligent Misrepresentation against Bank of America,
4 N.A.,
- 5 (3) Unfair Business Practices against Bank of America, N.A.
and Recontrust,
- 6 (4) International Interference with Contractual Relations
7 against Recontrust, Mudgett and Pacific Crest,
- 8 (5) Cancellation of Trustee's deed of trust against all
Defendants,
- 9 (6) Quiet Title against all Defendants,
- 10 (7) Declaratory Relief against all Defendants, and
- 11 (8) Injunctive Relief against Mudgett and Pacific Crest.

12 According to Plaintiff-Debtors' Complaint, Plaintiff-Debtors
13 were negotiating a loan modification with Bank of America, N.A.
14 Dckt. 47 at 4. A representative of Bank of America, N.A. allegedly
15 promised to postpone the Trustee's Sale, however, the Property was
16 subsequently sold to Pacific Crest at a nonjudicial foreclosure
17 sale. Plaintiff-Debtors assert that the nonjudicial foreclosure
18 sale was in violation of the postponement represented by Bank of
19 America, N.A. and that in reliance thereon, the Plaintiff-Debtors
20 had put off filing the present bankruptcy case.

21 Plaintiff-Debtors also allege that Pacific Crest is not a bona
22 fide purchaser of the property at the nonjudicial foreclosure sale
23 because they notified Mudgett, Pacific Crest's agent, that Bank of
24 America, N.A. was engaged in loan modification negotiations and
25 that the sale was postponed by the Bank. Mudgett disputes that
26 Plaintiff-Debtors told him that they were working on a loan
27 modification. On March 17, 2011, the court granted the motion for
28 relief from the automatic stay, authorizing Pacific Crest to

1 proceed with its rights under state law. However, this court issued
 2 a preliminary injunction enjoining Pacific Crest from proceeding
 3 with any action to obtain possession of the Property, which is
 4 conditioned on the Plaintiff-Debtors depositing \$2,000.00 a month
 5 with the Chapter 13 Trustee which may be used by this court for
 6 Fed. R. Civ. P. Rule 65(c) damages or payment of the claim secured
 7 by the Property if the foreclosure sale is rescinded.

8 ANALYSIS

9 At this early junction in the case, for this Motion to Abstain
 10 and the related motion to dismiss the adversary proceeding, the
 11 court considers the Complaint as pled by the Plaintiff-Debtors to
 12 identify what claims are being presented in this Adversary
 13 Proceeding and their connection to the bankruptcy case. The First
 14 Amended Complaint, Dckt. 11, alleges,

- 15 a. This is a core proceeding pursuant to 28 U.S.C.
 16 § 157(b)(2)(J), which the court concludes is a
 17 typographical error, and the reference is to
 18 § 157(b)(2)(K), which defines as core proceedings the
 "determination of the validity, extent, or priority of
 liens."
- 19 b. The Plaintiff-Debtors filed their Chapter 13 case on
 December 27, 2011.
- 20 c. The Plaintiff-Debtors reside at and claim to be the
 21 owners of the Property.
- 22 d. Plaintiff-Debtors have owned the Property since 1986 and
 23 as of the commencement of the case the Property had a
 fair market value of \$450,000.00.
- 24 e. Bank of America, N.A. held a promissory note ("First
 25 Note") on which the Plaintiff-Debtors owed \$218,741.00
 secured by a First Deed of Trust recorded against the
 Property.
- 26 f. Bank of America, N.A. held a second promissory note
 27 ("Second Note") on which the Plaintiff-Debtors owed
 \$151,186.00 secured by a Second Deed of Trust recorded
 against the Property.
- 28 g. Pacific Crest asserts that it purchased the Property at
 a nonjudicial foreclosure sale on December 27, 2010,

- 1 conducted for Bank of America, N.A. pursuant to the First
2 Deed of Trust.
- 3 h. Mudgett is a licensed real estate sales person who was at
4 all times relevant to the Complaint employed by Pacific
5 Crest.
- 6 i. In June 2010, the Plaintiff-Debtors submitted a completed
7 loan modification request to Bank of America, N.A. under
8 the HAMP program. Under the HAMP program, once a loan
9 modification application has been submitted, until Bank
10 of America, N.A. determined that the Plaintiff-Debtors
11 were ineligible for a loan modification, the Bank was
12 prohibited from conducting a foreclosure sale.
- 13 j. Bank of America, N.A. made the following representations
14 to the Plaintiff-Debtors:
- 15 i. During the loan modification review process Bank of
16 America, N.A. would not proceed with a foreclosure
17 on the Property;
- 18 ii. On or about October 21, 2010, Bank of America, N.A.
19 represented that it would send a Reinstatement
20 Letter to allow the Plaintiff-Debtors to bring the
21 loan current; and
- 22 iii. On December 17, 2010, Bank of America, N.A.
23 representative Lee LNU ["Last Name Unknown"] told
24 Plaintiff-Debtors' agent Jamie Cabrera that because
25 there was pending a loan modification request, the
26 nonjudicial foreclosure sale set for December 28,
27 2010, would be postponed.
- 28 k. In reliance on the representations by Bank of America,
N.A., the Plaintiff-Debtors,
- i. Ceased making payments to Bank of America, N.A.
while they were waiting for a decision on the
proposed loan modification; and
- ii. Refrained from taking other action, including the
filing of a Chapter 13 bankruptcy case, to protect
their ownership of the Property from being
foreclosed on by Bank of America, N.A.
- l. Prior to December 27, 2010, Bank of America, N.A.
announced that there would be a moratorium on
foreclosures, effective December 27, 2010.
- m. On December 24, 2010, Mudgett came to the Property and
informed the Plaintiff-Debtors that there would be a
foreclosure sale conducted for the Property on
December 27, 2011. Plaintiff-Debtors alleged that they
told Mudgett that there was a pending loan modification
for the obligation that was the subject of the

1 foreclosure sale.

2 n. On December 27, 2010, prior to the foreclosure sale,
3 Recontrust (the trustee under the First Deed of Trust)
4 was advised that the Debtors had filed a Chapter 13
5 bankruptcy. It is alleged that the representative of
6 Recontrust told the Plaintiff-Debtors that the file would
7 be placed in "bankruptcy status" and the foreclosure sale
8 would not be conducted.

9 o. It is further alleged that on December 27, 2011, a
10 foreclosure sale was conducted by Recontrust and the
11 Property was sold to Pacific Crest. The First Amended
12 Complaint further alleges that Pacific Crest represents
13 that it paid \$190,000.00 for the Property.

14 p. That the sale was invalid based on Bank of America, N.A.
15 having announced a moratorium on all foreclosure sales in
16 California.

17 q. That the sale was invalid because the Plaintiff-Debtors'
18 loan modification was under review and no determination
19 had been communicated to Plaintiff-Debtors by Bank of
20 America, N.A.

21 r. That Bank of America, N.A. lacked proper documentation
22 (though the First Amended Complaint does not allege the
23 missing documentation).

24 s. That Recontrust, trustee for Bank of America, N.A. under
25 the First Deed of Trust, was aware that the Chapter 13
26 bankruptcy case was filed and proceeded with the
27 foreclosure sale (which would be in violation of the
28 automatic stay).

t. That the sale to Pacific Crest was a sham transaction,
based on the great disparity between the alleged
\$190,000.00 sales price and the asserted \$450,000.00
value of the Property.

u. That the sale to Pacific Crest was a sham because it is
in the business of buying distressed properties at
foreclosure sales at prices severely under value in order
to resell such properties for a profit.

24 The First (Fraud) and Second (Negligent Misrepresentation)
25 Causes of Action are against Bank of America, N.A., asserting that
26 in reliance on the Bank's false representations the Plaintiff-
27 Debtors refrained from protecting their interests in the Property
28 and have been damaged at least \$100,000.00. The Third Cause of

1 Action is stated against Bank of America, N.A. and Recontrust under
2 California Business and Professions Code §§ 17200 et. seq.,
3 alleging unfair business practices relating to the loan
4 modification process with respect to the Plaintiff-Debtors. The
5 Fourth Cause of Action is stated against Recontrust, Mudgett, and
6 Pacific Crest, alleging that these Defendants intentionally
7 interfered with the contractual relationship between the Plaintiff-
8 Debtors and Bank of America, N.A., including the loan modification
9 process. The Fifth (Cancellation of Trustee's Deed) and Sixth
10 (Quiet Title) Causes of Action are asserted against all Defendants
11 and seeks cancellation of the trustee's deed delivered by
12 Recontrust to Pacific Crest and to have a determination that the
13 Plaintiff-Debtors own the Property. The Seventh Cause of Action is
14 for declaratory relief against all Defendants of their respective
15 rights and duties under the First Deed of Trust. The Eighth Cause
16 of Action seeks a permanent injunction against Mudgett and Pacific
17 Crest from asserting any ownership interests of Pacific Crest in
18 the Property.

19 The Chapter 13 Petition in the Plaintiff-Debtors' bankruptcy
20 case was filed at 11:01 a.m. on December 27, 2011. Eastern
21 District of California Case No. 10-53637. The First Amended
22 Complaint does not allege the specific time the foreclosure sale
23 was conducted, but does allege that it was after the filing of the
24 bankruptcy case. The bankruptcy petition was filed by the
25 Plaintiff-Debtors in pro se. On February 1, 2011, a substitution
26 of counsel was filed, naming John Downing as counsel for the
27 Plaintiff-Debtors in the Chapter 13 bankruptcy case.

28 **Federal Court Jurisdiction and Bankruptcy Court Proceedings**

1 Jurisdiction for this matter arises under 28 U.S.C. § 1334(b)
2 which provides for original but not exclusive federal court
3 jurisdiction for all civil proceedings arising under Title 11 (the
4 Bankruptcy Code), or arising in or related to cases under Title 11.
5 Federal court jurisdiction is exclusive for all property, wherever
6 located, of a debtor as of the commencement of the case and of
7 property of the estate. 28 U.S.C. § 1334(e)(1). Removal of a
8 state court action to federal court if federal jurisdiction exists
9 under 28 U.S.C. § 1334. 28 U.S.C. § 1452.

10 Congress vests in the bankruptcy courts, for matters referred
11 to the bankruptcy court by each respective United States District
12 Court, jurisdiction for all proceedings arising under Title 11, or
13 arising in or related to Title 11. The United States District
14 Court for the Eastern District of California has referred to this
15 bankruptcy court all matters arising under, arising in or related
16 to Title 11 as authorized in 28 U.S.C. § 157(a).¹ This bankruptcy
17 court may thereon enter final judgments and orders on all cases
18 under Title 11, core proceedings arising under Title 11 or arising
19 in a case under Title 11, and non-core proceedings to which the
20 parties have consented, with all such rulings being subject to
21 appellate review. 28 U.S.C. § 157(b)(1)(2), and (C)(2).

22 In *Stern v. Marshall*, ___ U.S. ___, 141 S. Ct. 2594 (2011),
23 the United States Supreme court considered the exercise of federal
24 court jurisdiction by the bankruptcy court. At issue in that case
25 was a counterclaim filed by the debtor against a creditor who had
26 filed a proof of claim in the bankruptcy case. At issue in *Stern*

27
28 ¹ Eastern District of California District Court General Order
182.

1 was whether the bankruptcy judge could issue the final judgment on
2 the counterclaim or such final determination must be made by an
3 Article III judge, absent the consent of the creditor.

4 Though concluding that the creditor had consented to
5 adjudication of the rights and interests under the proof of claim,
6 the Supreme Court engaged in further analysis of the counterclaim.
7 Merely because a creditor chooses to file a claim, and thereby
8 consent to the bankruptcy judge issuing the final judgment on the
9 counterclaim. In *Stern*, the counterclaim did not arise under or in
10 the bankruptcy case, but was a related matter wholly dependent on
11 state law.

12 Though the bankruptcy courts had been granted statutory
13 authority to hear and enter the final judgments on all
14 counterclaims against persons filing claims in a bankruptcy case,²
15 such authority could not be constitutionally forced on an objecting
16 creditor for a counterclaim which was unrelated to the claim filed
17 in the case. In *Stern*, there were no common issues or law shared
18 between the claim and counterclaim, and the debtor sought
19 affirmative relief (a more than four hundred million dollar
20 judgment) against the creditor. Because the creditor objected, the
21 bankruptcy judge was not permitted to enter the final judgment, but
22 such had to be entered by an Article III district court judge.
23 Though defined by Congress as a "core matter" subject to the final
24 jurisdiction of the bankruptcy judge, the counterclaim in *Stern* was
25 a "related to matter" for constitutional purposes.

26
27 For matters not arising under or arising in the bankruptcy
28

² 28 U.S.C. § 157(b) (2) (C)

1 case, defined as related to matters for which no consent³ is given
2 to the bankruptcy court for a final judgment, 28 U.S.C. § 157(c)
3 provides that the bankruptcy judge may hear the proceeding and
4 submit proposed findings of fact and conclusion of law to the
5 district court, for the district court to make the final
6 determinations and enter the judgment. The district court
7 considers the proposed findings of fact and conclusions of law and
8 reviews de novo matters to which any party has timely and
9 specifically objected.⁴

10 In the present case, the court is presented with a series of
11 state law, non-bankruptcy claims against the various defendants.
12 These sound as "related to" matters before this court. However,
13 the underlying, fundamental claim asserted by the Plaintiff-Debtors
14 is that the Property is owned by them and is property of the
15 bankruptcy estate.⁵ This is not merely an attempt to enforce
16 rights which are property of the bankruptcy estate (such as the
17 monetary counterclaim in *Stern*) but a dispute over ownership of the
18 Property itself.

19 Congress granted to the district courts and bankruptcy courts
20 exclusive jurisdiction over all property of the debtor, as of the
21 commencement of the case, and all property of the bankruptcy
22 estate.⁶ Though state law principles may be at issue in
23

24 ³ 28 U.S.C. § 157(c)(2) provides a statutory basis for parties
25 to consent for the bankruptcy judge to make the findings of fact,
26 conclusions of law, and enter the final judgment for non-core related
27 matters.

28 ⁴ 28 U.S.C. § 157(c)(1).

⁵ 11 U.S.C. § 541.

⁶ 28 U.S.C. § 1334(e).

1 determining the respective rights and interests of a person in
2 property of the estate, only the federal courts have jurisdiction
3 over those issues. The issue in this case concerning whether the
4 Property is property of the bankruptcy estate must be determined in
5 federal court. Determination of whether the Property is property
6 of the estate will necessarily determine facts and issues of law
7 which are at the basis for the other claims asserted by the
8 Plaintiff-Debtors. Because the parties cannot attempt to retry the
9 determinations made in these proceedings (doctrines of *res judicata*
10 and collateral estoppel), there is nothing for this court to
11 abstain from hearing.

12 That leaves for this court the decision of whether this is a
13 core matter, for which this court makes the findings of fact and
14 conclusions of law, and then enters the final judgment, or a
15 related to matter, for which this court transmits proposed findings
16 of fact and conclusions of law to the district court. This
17 requires both a statutory and constitutional analysis. Core
18 proceedings are defined by Congress to include (1) matters
19 concerning the administration of the estate, (2) orders to turn
20 over property of the estate, (3) determinations of validity,
21 extent, or priority of liens, (4) confirmation of plans, (5) orders
22 approving the use or lease of property, and (6) proceedings
23 affecting the liquidation of the assets of the estate, adjustment
24 of the debtor-creditor relationship.⁷ The First Amended Complaint
25 implicates each of these statutorily examples of core proceedings,
26 which go to the heart of this bankruptcy case - the restructure of
27 the Plaintiff-Debtors' finances and assets in a Chapter 13 case.

28 ⁷ 28 U.S.C. § 157(b)(2)(A), (E), (K), (L), (M), and (O).

1 Determination of the ownership of the Property is necessary for the
2 administration of the case and assets of the estate. No use of the
3 Property, control of the Property, determination of the extent,
4 validity, and priority of the liens, or completion of any
5 bankruptcy plan can occur without this determination. As defined
6 by Congress, this is a core proceeding for the bankruptcy judge to
7 issue the final judgment.

8 The core versus related proceeding analysis in this case has
9 an additional curve, the asserted ownership of the Property by
10 Pacific Crest. There is no contention that Pacific Crest was a
11 creditor of the Plaintiff-Debtors. In this fight, Pacific Crest
12 advances itself as a person who purchased property at a nonjudicial
13 foreclosure sale, with no other entanglement with the Plaintiff-
14 Debtors or Bank of America, N.A. But for the Plaintiff-Debtors
15 asserting that the Property is property of the bankruptcy estate,
16 Pacific Crest would not be before the court. However, that claim
17 of ownership implicates and impedes with the exercise of the core
18 proceeding jurisdiction of this bankruptcy court.

19 As instructed by the Supreme Court in *Stern*, the court must
20 also consider whether the bankruptcy judge, as a judicial officer
21 of the district court,⁸ entering the final judgment, findings, and
22 conclusions improperly treads on the judicial power of the United
23 States to be exercised by Article III judges. Though filing an
24 answer, Mudgett and Pacific Crest deny the allegation that this is
25 a core matter and by their conduct have not consented to this
26 bankruptcy court entering the final judgment in the event that this
27 is not a core proceeding.

28 ⁸ 28 U.S.C. § 151.

1 As opposed to *Stern*, the issues in this Adversary Proceeding
2 relate to the core principals arising under and in a bankruptcy
3 case, the administration and ability to use property of the
4 bankruptcy estate in a reorganization by the debtor. Accepting
5 Pacific Crest's contentions, it would be entitled to immediately
6 dispossess the Plaintiff-Debtors of the Property through the
7 expedited unlawful detainer proceedings in state court. By that
8 state court process, Congress' statutory scheme for a uniform
9 bankruptcy law would be impermissibly thwarted.

10 Due to the timing of the decision in *Stern* and briefing on
11 this matter, the parties were unable to provide the court with
12 thoughtful analyses of this issue. Given the involvement of
13 Pacific Crest in this Adversary Proceeding and the newness of the
14 *Stern* issue, the court will err on the side of caution and treat
15 this adversary proceeding as a contested matter subject to the
16 provisions of 28 U.S.C. § 157(c)(1), conduct the proceedings, and
17 make proposed findings of fact and conclusions of law to the
18 district for the entry of the final judgment for all future matters
19 in this Adversary Proceeding, effective December 1, 2011.

20 If upon further reflection the parties decide to consent to
21 this court making the findings of fact and conclusions of law and
22 entering the final judgment, they may do so in writing and filed
23 with the court by January 20, 2012. Such consent must be provided
24 early in the proceeding and is not something to be withheld until
25 the eve of trial. Conversely, the parties may seek to have the
26 district court withdraw the reference of this Adversary Proceeding
27 and conduct all proceedings in the district court pursuant to
28 28 U.S.C. § 157(d).

Ruling on Mandatory Abstention

According to 28 U.S.C. § 1334(c)(2), a bankruptcy court "shall" abstain from hearing a proceeding based on state law claims, but not arising under or arising in a case under Title 11, if "an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction." *Williams v. Shell Oil Co.*, 169 B.R. 684, 688, 690-91 (Bankr. S.D. Cal. 1994). This is called "mandatory abstention."

The bankruptcy court is required to abstain from hearing "a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11' unless there is another basis for federal jurisdiction or the matter cannot be timely adjudicated in state court." *In re Meadowbrook Estates*, 246 B.R. 898, 903 (Bankr. E.D. Cal. 2000) (quoting 28 U.S.C. § 1334(c)(2)). "The bankruptcy court is not required to abstain unless the proceeding is merely 'related to' a case under title 11. Generally speaking, related proceedings concern causes of action that are owned by the debtor at the time the petition is filed and that become part of the estate pursuant to 11 U.S.C. § 541(a)." *Id.*

In this adversary proceeding, the complaint alleges eight (8) state law claims. Movant-Defendants argue that the claims cannot be adjudicated by the bankruptcy court because they are not "core" proceedings. However, the *Stern v. Marshall* holding that "core proceedings are those that arise in a bankruptcy case or under Title 11," and "[t]he detailed list of core proceedings in § 157(b)(2) provides courts with ready examples of such matters." 2011 WL 2472792 at *10, 2011 U.S. LEXIS 4791 at *28. It is clear

1 that the Plaintiff-Debtors' eight claims "concern the
2 administration of the estate" and could be considered core
3 proceedings pursuant to 28 U.S.C. § 157(b)(2). First, Movant-
4 Defendants argue that the real property at the heart of Plaintiff-
5 Debtors' claims is not property of the Bankruptcy estate, because
6 it was sold prior to Plaintiff-Debtors' filing of the petition.
7 However, whether or not this property is part of the Bankruptcy
8 estate is exactly what Plaintiff-Debtors hope to establish. If
9 Plaintiff-Debtors' causes of action succeed, the Property may well
10 become part of the bankruptcy estate.

11 Next, Movant-Defendants argue that Plaintiff-Debtors' causes
12 of action are not so closely related to the bankruptcy case as to
13 warrant being heard by this bankruptcy court. Unlike the
14 counterclaim at issue in *Stern*, Plaintiff-Debtors' claim in the
15 instant case is directly tied up in the administration of the
16 estate and liquidation of its assets. The Plaintiff-Debtors assert
17 that the property at issue is property of the bankruptcy estate to
18 be administered through the Chapter 13 plan. All of the claims
19 center around the facts and ruling the court must make in
20 determining the property of the Estate in this case. In addition,
21 this issue involves the proof of claim filed by Bank of America,
22 N.A. in this case, asserting that it still has a deed of trust
23 against the Mineral Springs Property.

24 Movant-Defendants argue that this court must abstain because
25 the Chapter 13 plan can be confirmed without the inclusion of the
26 subject property, and the complaint will have no impact on the
27 administration of the bankruptcy estate. Both of theses arguments
28 are built on the contention that the instant claim is not a core

1 proceeding. However, as addressed above, the Plaintiff-Debtors'
2 claim is core proceedings pursuant to 28 U.S.C. § 157(b)(2).
3 Further, as discussed below, there has been no showing that there
4 can be another proceeding timely (consistent with the time limits
5 imposed by Congress in a Chapter 13 case) adjudicated in a state
6 forum.

7 **Ruling on Permissive Abstention**

8 Should the doctrine of mandatory abstention not apply, Movant-
9 Defendants argue that the court should abstain from hearing this
10 adversary proceeding under the doctrine of permissive abstention.
11 The court may abstain from hearing a proceeding arising under
12 title 11, or arising in or related to a case under title 11, if
13 doing so is in the interests of justice, comity with state courts,
14 or respect for state law. 28 U.S.C. § 1334(c)(1). "Unlike
15 mandatory abstention which applies only to non-core matters,
16 discretionary abstention applies to both core and non-core
17 matters." *Holtzclaw v. State Farm Fire and Casualty Co. (In re*
18 *Holtzclaw)*, 131 B.R. 162, 164 (E.D. Cal. 1991) (citing *In re*
19 *Ascher*, 128 B.R. 639, 645 (Bankr. E.D. Ill. 1991)).

20 In deciding if abstention is appropriate, the court considers
21 the following nonexclusive factors:

- 22 (1) the effect or lack thereof on the efficient
23 administration of the estate if a Court recommends
abstention,
- 24 (2) the extent to which state law issues predominate over
25 bankruptcy issues,
- 26 (3) the difficulty or unsettled nature of the applicable
law,
- 27 (4) the presence of a related proceeding commenced in state
28 court or other nonbankruptcy court,
- (5) the jurisdictional basis, if any, other than 28 U.S.C.

1 § 1334,

2 (6) the degree of relatedness or remoteness of the proceeding
3 to the main bankruptcy case,

4 (7) the substance rather than form of an asserted "core"
5 proceeding,

6 (8) the feasibility of serving state law claims from core
7 bankruptcy matters to allow judgments to be entered in
8 state court with enforcement left to the bankruptcy
9 court,

10 (9) the burden of [the bankruptcy court's] docket,

11 (10) the likelihood that the commencement of the proceeding in
12 bankruptcy court involves forum shopping by one of the
13 parties,

14 (11) the existence of a right to a jury trial, and

15 (12) the presence in the proceeding of nondebtor parties.

16 *In re Tucson Estates, Inc.*, 912 F.2d 1162, 1167 (9th Cir. 1990).

17 On balance, the aforementioned factors weigh against
18 permissive abstention. The subject property is potentially of
19 great importance to the estate, and therefore abstention may
20 negatively impact the efficient administration of the estate.
21 There is no indication that the state law governing the claim is
22 particularly difficult, unsettled or otherwise ill-suited for
23 hearing in this court. Furthermore, Plaintiff-Debtors' claim is
24 closely related to the main bankruptcy case.

25 A well repeated legal principle is "justice delayed is justice
26 denied."⁹ For bankruptcy debtors, the inability to proceed with a
27 reorganization and adjudication of the respective rights of the
28 parties may well be the death knell of the reorganization. It has

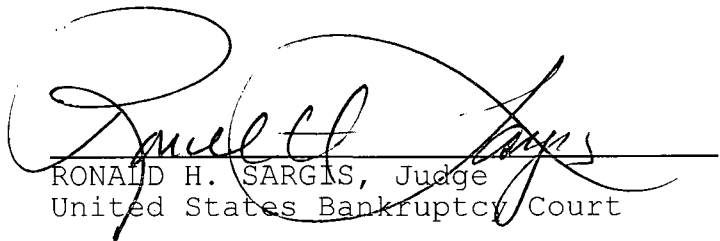
⁹ This legal maxim is often attributed to William Ewart Gladstone and William Penn. This concept was included in the Magna Carta, Clause 40, and Chief Justice Burger's comments in an address to the American Bar Association, August 10, 1970.

1 not been shown to this court that, to the extent the court does not
2 exercise the grant of exclusive jurisdiction over property of the
3 estate and to determine what is property of the estate, that the
4 issue can and would be determined in state court in a manner which
5 would not conflict with the reorganization in this case.

6 The motion for abstention is denied.

7 This Memorandum Opinion and Decision constitutes the court's
8 findings of fact and conclusions of law. A separate order shall be
9 issued consistent with the ruling in this decision.

10 Dated: November 29, 2011

11
12 
13 RONALD H. SARGIS, Judge
14 United States Bankruptcy Court
15
16
17
18
19
20
21
22
23
24
25
26
27
28

This document does not constitute a certificate of service. The parties listed below will be served a separate copy of the attached document(s).

Adam Barasch
1 Embarcadero Center #2600
San Francisco, CA 94111

John Downing
10069 W River St #6C
Truckee, CA 96161

Scott CoBen
1214 F St
Sacramento, CA 95814

Recontrust, N.A.
Attn: Officer, Managing or General Agent for Service
1800 Tapo Canyon Rd
Simi Valley, CA 93063

G. Wendell Ulberg
PO Box 1024
Tahoe City, CA 96145

Kathleen Ulberg
PO Box 1024
Tahoe City, CA 96145

David Cusick
PO Box 1858
Sacramento, CA 95812-1858

Office of the U.S. Trustee
Robert T Matsui United States Courthouse
501 I Street, Room 7-500
Sacramento, CA 95814